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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1627

ARTHUR W. BROWN, Receiver ..... PETITIONER

VS:

COMMONWEALTH OF KENTUCKY ..... RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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MAY IT PLEASE THE COURT:

OPINION BELOW

The opinion below from the United States Court of Appeals for the Sixth Circuit, dated April 2, 1975, which is reported at 513 F.2d 333, appears in Petitioner's Petiton, Appendix B. The opinions of the United States Dis-

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trict Court for the Western District of Kentucky, which are not reported, appear in Petitioner's Petition, Appendix E.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1254(1), the proper provision for a decision of the United States Court of Appeals.

QUESTION PRESENTED

WHETHER THE FEDERAL COURTS HAVE THE REQUISITE JURISDICTION TO ADJUDICATE AN ACTION AGAINST THE COMMONWEALTH OF KENTUCKY BROUGHT BY ONE OF ITS CITIZENS UNDER THE FEDERAL SECURITIES ACTS, WHERE THE COMMONWEALTH HAS NEITHER CONSENTED TO BE SUED NOR WAIVED ITS ELEVENTH AMENDMENT IMMUNITY FROM SUIT IN FEDERAL COURT.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and Statutory provisions involved are adequately set forth in the Petition.

STATEMENT

This action is before this Court to review the Opinion of the United States Court of Appeals for the Sixth Circuit which affirmed the opinion of the United States District Court for the Western District of Kentucky.

The District Court sustained the Commonwealth's Motion to Dismiss petitioner's complaint against it on the

jurisdictional basis that the Commonwealth had neither consented to be sued nor waived its Eleventh Amendment immunity from suit in federal court.

The United States District Court for the Western District of Kentucky, Honorable Rhodes Bratcher, Judge, in its Opinion in this case, concluded that the Commonwealth was not amenable to suit in federal court for alleged violations of federal securities law because: (1) the Commonwealth, by entering an area subject to concurrent federal regulation, neither expressly nor impliedly consented to the adjudication of claims against it nor waived its Eleventh Amendment immunity in federal court and (2) a review of the relevant federal securities statutes did not reveal an expressed desire by Congress to deprive the states of their constitutional immunity to suit in federal court (Appendix D of Petition).

The Sixth Circuit affirmed the judgment of the District Court (Appendix B of Petition).

ARGUMENT

THE FEDERAL COURTS DO NOT HAVE THE REQUISITE JURISDICTION TO ADJUDICATE AN ACTION AGAINST THE COMMONWEALTH OF KENTUCKY BROUGHT BY ONE OF ITS CITIZENS UNDER THE FEDERAL SECURITIES ACTS, WHERE THE COMMONWEALTH HAS NEITHER CONSENTED TO BE SUED NOR WAIVED ITS ELEVENTH AMENDMENT IMMUNITY FROM SUIT IN FEDERAL COURT.

The Eleventh Amendment to the United States Constitution precludes the exercise of federal court jurisdiction in the case at bar.

The Eleventh Amendment reads:

> "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign State."

Although this amendment is not literally applicable since most or all of the plaintiffs are residents of the Commonwealth, this Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State. *Hans* v. *Louisiana,* 134 U.S. 1, 33 L.Ed. 842, 10 S.Ct. 504 (1890); *Parden* v. *Terminal R. Co.,* 377 U.S. 184, 12 L.Ed2d 233, 84 S.Ct. 1207 (1964); *Employees* v. *Department of Public Health and Welfare,* 411 U.S. 279, 36 L.Ed.2d 251, 93 S.Ct. 1614 (1973); and *Edelman* v. *Jordan,* 415 U.S. 651, 39 L.Ed2d 662, 94 S. Ct. 1347 (1974).

It is well established that a state may waive its Eleventh Amendment right and submit to the jurisdiction of the federal courts. *Petty* v. *Tennessee-Missouri Bridge Comm.,* 359 U.S. 275, 3 L.Ed.2d 804, 79 S.Ct. 785 (1959); *Parden,* supra; *Employees,* supra.

However, the Commonwealth of Kentucky has not waived its Eleventh Amendment immunity by consenting to being sued in federal court. Furthermore, immunity from suit is a sovereign right of the Commonwealth and such is provided for by Section 231 of the Kentucky Constitution which reads:

> "The general assembly may, by law, direct in

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what manner and in what courts suits may be brought against the Commonwealth."

In *Taylor* v. *Westerfield,* Ky., 26 S.W.2d 557 (1930), the Kentucky Court of Appeals explained the purpose of Section 231:

> "The reason for exempting a municipality or sovereign from damages for injuries inflicted in the performance of its governmental functions is one of public policy to protect public funds and public property. Taxes are raised for certain specific governmental purposes, and, if they could be diverted to the payment of damage claims, the more important work of government, which every municipality or sovereign must perform, regardless of its other relations, would be seriously impaired, if not totally destroyed. The reason for the exemption is sound and unobjectionable."

Section 231 places a very specific limitation on the power of the General Assembly to waive the Commonwealth's immunity. Only the General Assembly has the power to waive this immunity and such cannot be waived indirectly or by implication.

As the Kentucky Court of Appeals in *Foley Construction Company* v. *Ward, Ky.,* 375 S.W.2d 392, 396 (1963), stated:

> ". . . To reiterate, the constitutional section in question has always been every explicit. The word 'may' in Section 231 indicates that suits against the Commonwealth may be brought as a matter of legislative grace. *Commonwealth* v. *Chevis,* 4 Ky. Law

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> Rep. 892. *Only by authority "of an enactment of the Legislature may such suit* be brought, and *then the manner of bringing a suit and the court in which it may be brought must be directed. . . ."* (Emphasis added.)

Thus, the Commonwealth has not consented to be sued or waived its immunity from suit in federal court.

In addition to the fact that the Commonwealth has not consented to this type suit, there is no indication that Congress has expressed an intent that a state should be amenable to suit in federal court by entering into an area subject to concurrent federal regulation, i.e., the regulation and supervision of financial institutions.

Nowhere in the Securities Act of 1933 nor in the Securities Exchange Act of 1934 can there be found any expressed intention of Congress to strip the states of their Eleventh Amendment rights. The purpose behind the Securities Act was to protect investors against malpractice in the securities and financial markets. They were enacted to eliminate and mitigate undesirable practices in the securities field and were aimed at the unscrupulous dealer. See 2 U.S. Cong. & Adm. News 1964, p. 3016.

The Commonwealth in creating a Department of Banking and Securities had basically the same objectives in mind. There is no indication of any Congressional intent to even preempt the states in this type regulation, let alone subject the states to suit in a federal forum for alleged negligence in this activity.

In *Edelman* v. *Jordan,* supra, concerning a state's Eleventh Amendment rights, it is stated:

> ". . . In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.' *Murray* v. *Wilson Distilling Co.* 213 US 151, 171, 53 L.Ed. 742, 29 S.Ct. 458 (1909). We see no reason to retreat from the Court's statement in Great Northern Insurance Co. v. Read, 322 US 47, 54, 88 L.Ed. 1121, 64 S. Ct. 873 (1945) (footnote omitted):
>
> " '[W]hen we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found.' "

Congress, by its silence as to the amenability of states to suits in federal courts, cannot be presumed to have conditioned the regulation of securities by a State upon the waiver of its Eleventh Amendment immunity.

The Commonwealth, through its Department of Banking and Securities, undertook to perform a much needed public service (the supervision of financial institutions), a distinctly essential governmental function.

This fact alone distinguishes the instant case from *Parden*, supra, a case upon which appellant places much reliance. In *Parden*, the activity undertaken by the State of Alabama was proprietary in nature, i.e., the running of a state-owned railroad in interstate commerce for pro-

fit. Whereas, in the instant case, the regulation and supervision of financial institutions is an activity strictly governmental in nature.

For this reason, the Sixth Circuit and the District Court correctly found that the Commonwealth, in choosing to provide this needed public service did not voluntarily consent to have claims brought against her as a result of such activities adjudicated in a federal forum (Appendix B and D of Petition).

As Mr. Justice Marshall stated in his concurring opinion in *Employees*, supra.

> "... To suggest that the State had the choice of either ceasing operation of these vital public services or 'consenting' to federal suit sufficies, I believe, to demonstrate that the State had no true choice at all and thereby that the State did not voluntarily consent to the exercise of federal jurisdiction in this case. Cf. Marchetti v. United States, 390 US 39, 51-52, 19 L.Ed.2d 889, 88 S.Ct. 697 (1968). In Parden, Alabama entered the interstate railroad business with at least legal notice of an operator's responsibilities and liability under the FELA to suit in federal court, and it could have chosen not to enter at all if it considered that liability too onerous or offensive. It obviously is a far different thing to say that a State must give up established facilities, services, and programs or else consent to federal suit. Thus, I conclude that the State has not voluntarily consented to the

exercise of federal judicial power over it in the context of this case." (footnote omitted)

CONCLUSION

Respondent submits that the petition for certiorari should be denied because the federal courts lack the requisite jurisdiction to adjudicate this action against the Commonwealth brought by one of its citizens under the Federal Securities Acts, where the Commonwealth has neither consented to be sued nor waived its Eleventh Amendment immunity from suit in federal court.

In addition, certiorari should be denied because the decisions of the District Court and the Sixth Circuit are clearly correct and there is neither a conflict of decision nor a substantial federal question presented.

In his petition, petitioner cites *MacKethan* v. *Commonwealth of Virginia*, 370 F.Supp. 1 (E.D. Va. 1974); 508 F.2d 838 (4th Cir. 1974), as being similar to this action and all arguments in that case apply to the instant case with equal force. We agree. This Court on June 23, 1975 denied certiorari in *MacKethan*, supra (74-1198; 43 LW 3672)

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James M. Ringo, one of counsel for respondent, hereby certify that the foregoing Brief for Respondent in Opposition was served on petitioner by depositing copies of same in the United States mail, first class postage prepaid, on July 18, 1975, addressed to James N. Williams, Jr., Esq. Wyatt, Grafton & Sloss, 2800 Citizens Plaza, Louisville, Kentucky 40202, Counsel for Plaintiff-Petitioner Arthur W. Brown; Thomas C, Jacobs, Esq., Department of Banking & Securities, Frankfort, Kentucky 40601, Counsel for Defendant-Respondent Perry R. Miller; W. Scott Miller, Jr., Esq. 602 Louisville Trust Building, One Riverfront Plaza, Louisville, Kentucky 40202, Co-Counsel for Defendant-Respondent E. G. Adams; Merritt S. Deitz, Jr., Esq., Suite 504, 100 North Sixth Street, Louisville, Kentucky 40202, Co-Counsel for Defendant-Respondent E. G. Adams; Leon J. Shaikun, Esq., Marion E. Taylor Building, Louisville, Kentucky 40202, Attorney for Defendant-Respondent Robert L. Musselman; Frank A. Logan, Esq., 504 Kentucky Home Life Building, Louisville, Kentucky 40202, Co-Counsel for Defendant-Respondent Thomas G. Florence; Frank E. Haddad, Jr., Esq., 529 Kentucky Home Life Building, Louisville, Kentucky 40202, Co-Counsel for Defendant-Respondent Thomas G. Florence; William Compton, Esq., Assistant Attorney General, State House Annex, Columbus, Ohio 43215, Counsel for State of Ohio, Ami-

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CERTIORARI DENIED